Supreme Court, U.S.
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No. 03-7

IN THE

# Supreme Court of the United States

THE REV. DR. MICHAEL A. NEWDOW,

*Petitioner,*

*v.*

THE CONGRESS OF THE UNITED STATES OF AMERICA; THE UNITED STATES OF AMERICA; GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES; THE STATE OF CALIFORNIA; THE ELK GROVE UNIFIED SCHOOL DISTRICT ("EGUSD"); DAVID W. GORDON, SUPERINTENDENT, EGUSD; THE SACRAMENTO CITY UNIFIED SCHOOL DISTRICT ("SCUSD"); DR. JIM SWEENEY, SUPERINTENDENT, SCUSD,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

MICHAEL NEWDOW, *Pro Se*
Post Office Box 233345
Sacramento, CA 95823
(916) 392-7382

181470

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

3 H PP

## QUESTIONS PRESENTED

(1) Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

(2) Whether (in circumstances such as the one at bar) there is a waiver of sovereign and Speech or Debate immunities inherent in the Establishment Clause.

(3) Whether the Petitioner in this case has Article III standing to challenge the Pledge of Allegiance on Establishment Clause grounds.

## PARTIES TO THE PROCEEDING

Rev. Dr. Michael A. Newdow is Plaintiff and Petitioner here. The federal defendants are the United States Congress, the United States of America, and George W. Bush.* The State of California, the Elk Grove Unified School District ("EGUSD"), David W. Gordon, Superintendent, EGUSD, the Sacramento City Unified School District ("SCUSD"); and Dr. Jim Sweeney, Superintendent, SCUSD, were all named as state defendants. The United States Congress, the President, the State of California, SCUSD and Dr. Sweeney were all dismissed as defendants by the Court of Appeals.

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* Pursuant to Rule 35 of the United States Supreme Court, George W. Bush has been substituted for William Jefferson Clinton, his predecessor, who was named originally in his official capacity as President of the United States.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

An amended opinion of the Court of Appeals (on rehearing) was filed on February 28, 2003, and is reported at 321 F.3d 772. (App., 1a-24a).** The original panel opinion (June 26, 2002) is reported at 292 F.3d 597. (App. 28a-58a). Attempts to intervene by the Senate and by the mother of Newdow's child were denied on December 4, 2002, at 313 F.3d 495 (App., 99a-107a) and 313 F.3d 506 (App., 108a-109a), respectively. Newdow's standing as a parent was upheld on that same date at 313 F.3d 500 (App., 89a-98a).

The case was originally heard before a magistrate judge, who, on May 25, 2000, issued Findings and Recommendation that were not reported. (App., 111a-112a). The District Court adopted the Findings and Recommendation on July 21, 2000 (App., 110a).

## STATEMENT OF JURISDICTION

The original judgment of the Ninth Circuit Court of Appeals was entered on June 26, 2002. Rehearing and rehearing *en banc* were denied on February 28, 2003, although an amended opinion was issued at that time. This Court has jurisdiction to review the Judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1). Justice O'Conner extended the time to file this petition until June 26, 2003.

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** Citations to the Appendix refer to the Appendix provided by the United States of America in its Petition for Certiorari to this Court (Docket #02-1574).

## CONSTITUTIONAL PROVISION, STATUTES AND RULE AT ISSUE

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

4 U.S.C. § 4:

> The Pledge of Allegiance to the Flag, "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.", should be rendered by standing at attention facing the flag with the right hand over the heart.

California Education Code § 52720:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

Elk Grove Unified School District Rule AR 6115:

> Each elementary school class [shall] recite the pledge of allegiance to the flag once each day.

## STATEMENT OF THE CASE

The Pledge of Allegiance to the Flag was first created in 1892, in celebration of the 400th anniversary of Columbus's "discovery" of America. After a subsequent half century of widespread unofficial adoption, Public Law No. 622, 56 Stat. 380 (June 22, 1942) took effect, codifying the Pledge of Allegiance to the Flag of the United States of America (hereinafter "the Pledge"), which read:

> I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all.

Of note is the fact that there is and was nothing religious in that 1942 version of the Pledge. Twelve years later, however – claiming that, "Our American Government is founded on . . . the belief that the human person is important because he was created by God," H.R. 1693, 83rd Cong., 2nd Sess. (1954), and that "The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator," *Ibid.* – Congress amended the Pledge. Thus, in an act that did nothing but add the two purely religious words, "under God," to the preceding prose, Congress altered the Nation's sole Pledge so that it now reads:

> I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

Pub. L. No. 396, 68 Stat. 249 (hereinafter "Act of 1954"). That version of the Pledge is currently codified at 4 U.S.C. § 4.

Petitioner Newdow is a citizen of the United States, entitled to all the protections of the Constitution. He is also an atheist, who adamantly denies the existence of any supreme being, and

who finds the notion that his government espouses the contrary religious view at all – much less as part of its only Pledge of Allegiance – to be deeply offensive and injurious. Accordingly, citing the First Amendment, he filed suit in the United States District Court for the Eastern District of California on March 8, 2000, challenging the current version of the Pledge. Seeking only declaratory and injunctive relief, he asked the district court, among other things, "[t]o declare that Congress, in passing the Act of 1954, violated the Establishment and Free Exercise Clauses of the United States Constitution," and "[t]o demand that Defendant the Congress of the United States of America immediately act to remove the words 'under God' from the Pledge of Allegiance to the Flag as now written." Original Complaint, at 36.

Newdow set out numerous grounds for standing. Chief among these was his personal right to join his fellow citizens in pledging allegiance to his country's flag – and all it stands for – without having to confront offensive religious dogma. With a (simply wonderful) daughter in elementary school, Newdow attends meetings of the local school board. Because those meetings invariably begin with a recitation of the now-religious Pledge, Newdow named the school board and its superintendent as defendants, contending that their use of the Pledge constituted a governmental endorsement of a specific religious belief – i.e., the belief that there exists a god – and thus turned him into a "political outsider."

Struck by the fact that his tax dollars are employed to further the religious message of the current Pledge, Newdow also claimed that he had taxpayer standing, detailing how both (California) state and (Article I, section 8) federal tax moneys are used. Additionally, because the State of California specifically declares that the daily recitation of the now-religious Pledge of Allegiance is a proper patriotic exercise in which public school teachers may lead their students (California Education Code § 52720) – and because the Elk Grove Unified

School District ("EGUSD") has promulgated a rule requiring recitation of the Pledge in elementary schools (AR 6115) – Newdow claimed standing on the basis of his right as a parent to have the public schools refrain from inculcating his child with any religious ideology.[1]

The school board defendants filed a Federal Rules of Civil Procedure Rule 12(b)(6) Motion to Dismiss on April 12, 2000, and – on May 15, 2000 – a hearing on that Motion was held before Magistrate Judge Peter A. Nowinski. On May 25, 2000, Findings and Recommendation, recommending that the Motion be granted, were issued. According to the Magistrate Judge:

> The Seventh Circuit's decision in *Sherman* and the statements in dicta [from this Court and two Courts of Appeal], while not binding on this court, are persuasive and directly on point. Whether the court employs the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), or the more recent endorsement test, *see Allegheny*, *supra*, 492 U.S. at 593-694, the Pledge does not violate the Establishment Clause of the First Amendment.

Findings and Recommendation, at 2. (App., 112a). The District Court, Hon. Milton L. Schwartz, adopted the Findings and Recommendation in an Order issued on July 21, 2000. (App., 110a).

Newdow filed a timely notice of appeal on July 26, 2002. After briefing and oral argument, the judgment of the District Court was reversed in a panel decision rendered on June 26, 2002. The two-judge majority determined that by including the religious words, "under God," in the Pledge of Allegiance, the government has violated the Establishment Clause. Accordingly, the policy of the EGUSD was held to be impermissible. However

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1. It should be noted that Newdow also claimed violations of California's State Constitution. Those have never been addressed in either of the lower courts.

– apparently due to the national uproar that resulted from the panel majority's opinion – Circuit Judge Alfred T. Goodwin, the opinion's author, *sua sponte* stayed the judgment on June 27, 2002 (pending motions for rehearing).

Although the United States Congress had previously moved to be dismissed from the case on jurisdictional grounds (in a Motion which was granted on April 2, 2002) the Senate attempted to intervene after the June 26, 2002 decision was announced. The mother of Newdow's child did the same, claiming that their daughter "does not object to and is not uncomfortable with either personally reciting, or hearing others recite, the Pledge of Allegiance." July 31, 2002 Declaration of Sandra Banning in Support of Motion for Leave to Intervene, or Alternatively, to Dismiss the Complaint, at 3. The panel denied both Congress's and the mother's motions on December 4, 2002, while simultaneously issuing a unanimous opinion reaffirming Newdow's standing as a parent.

Motions for rehearing and rehearing *en banc* were denied on February 28, 2003. The majority panel did, however, amend its June 26, 2002 opinion at that time, eliminating the language that stated the Pledge violates the Establishment Clause. Thus, the declaratory relief sought by Newdow – i.e., a ruling that the Pledge of Allegiance (as amended by Congress's Act of 1954) is in violation of the Establishment Clause – was not obtained. Rather, the opinion below states only that, "the school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words "under God," violates the Establishment Clause." (App., 17a).

## PETITIONS DISTINGUISHED

The United States and the Elk Grove Unified School District have both filed Petitions for Certiorari in this case. Newdow – although the "prevailing party" in the court below – is filing a Petition as well.[2] His reasons are as follows. First, Newdow did not obtain the full relief he sought. Although the original panel stated that "we hold that . . . the 1954 Act adding the words "under God" to the Pledge . . . violate[d] the Establishment Clause," App., at 52a, that language was withdrawn in the amended opinion. Newdow, therefore, wishes for this Court to provide the full declaratory relief sought in his Original Complaint, and to have the Nation's sole Pledge returned to its pre-1954, secular condition.

Along those lines, Newdow is also asking the Court to review the limited standing determination made by the Ninth Circuit. Although he most certainly feels that his right to have his child attend public school without being inculcated with any religious belief is an interest of great importance, the pervasive antiatheistic sentiments conveyed by the infusion of God into our government is of even greater concern. Those who deny the existence of a supreme being have been turned into second class citizens by a government that continuously sends messages that "real Americans" believe in God. For this reason, Newdow seeks the explicit recognition that the injury repeatedly mentioned by this Court – i.e., being turned into a "political outsider" – is not mere hyperbole, but a true injury that warrants judicial attention. Newdow, a full citizen who happens to hold a minority religious view, has standing on his own to bring an end to the discrimination his government continues to foster.

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2. The Ninth Circuit issued its amended opinion in this case, and its order denying rehearing and rehearing *en banc*, on February 28, 2003. Absent an extension, this petition would therefore have been due on May 28, 2003. Newdow sought an extension until June 26, 2003, which was granted by Justice O'Connor on May 20, 2003.

Finally, this Petition seeks recognition of the fact that governmental immunities are not absolute, and that they must fall when the fundamental rights they exist to protect cannot be vindicated in any other manner.

## REASONS FOR GRANTING THE PETITION

### (1) The Establishment Clause Violation

> [O]ur Establishment Clause jurisprudence is in hopeless disarray."[3]

> As judges of the inferior courts of the federal system, we do our best to resolve cases in the light of Supreme Court guidance. Alas, its instructions on implementation of the Establishment Clause are not always clear, consistent or coherent.[4]

Perhaps nowhere can the creative genius of the framers be as readily appreciated as in the Establishment Clause. Realizing that religion is unique in its ability to cause divisiveness and persecution, those who drafted the body of the Constitution and the Bill of Rights – and the citizens who ratified both of these magnificent documents – broke from a long tradition of associating religious belief with civil authority. That the framers intended to completely disassociate these two arenas can be seen by the fact that – after considering numerous iterations – the final wording of the clause is as broad as can be imagined: "no law respecting an establishment of religion."

That this dissociation would also include the disassociation of God and government also seems manifest. To begin with, as was noted early on in our history:

> We formed our Constitution without any acknowledgment of GOD; without any recognition

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3. *Rosenberger v. University of Virginia*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

4. *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 627 (9th Cir. 1996) (O'Scannlain, J., concurring).

> of his mercies to us, as a people, of his government, or even of his existence. The Convention, by which it was formed, never asked, even once, his direction, or his blessing upon their labours. Thus we commenced our national existence under the present system, without GOD.[5]

Thus, for instance, the Preamble to the Constitution of the United States is devoid of any reference to the Almighty. Despite the fact that "so help me, God" commonly concluded the oaths of the era,[6] the only oath specified in the Constitution omits those words.[7]

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5. A discourse in two parts: delivered July 23, 1812, on the public fast, in the chapel of Yale College by Timothy Dwight, D.D.L.L.D., President of that Seminary; Published at the request of the students, and others; New Haven, Published by Howe and Deforest; Sold also by A.T. Goodrich and Co. No, 124, Broadway, New-York; Printed by J. Seymour, 49, John Street, New York, p. 40).

6. "So help me God" was specified in the 1777 Constitution of Georgia (Article 14), the 1780 Constitution of Massachusetts (Article 3), and the 1778 South Carolina Constitution (Article 36). Additionally, the oath in the Delaware Constitution of 1776 stated, "I, A B. do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration." The 1776 Pennsylvania Constitution had a similar oath: "I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration."

7. Article II, section 1, clause 7 of the United States Constitution states:

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:
>
> "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Similarly, of the eleven[8] colonies with religious test oaths of some variety, five had proscriptions aimed in some way at atheists.[9] Yet in Article VI, clause 3, the framers employed

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8. "[E]leven of the thirteen states restricted office holding to Protestants or Christians." Epstein SB. *Rethinking the Constitutionality of Ceremonial Deism*. 96 Colum. L. Rev. 2083, 2101 (1996).

9. Maryland Constitution of 1776 (Declaration of Rights, Article 35: "That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention or the Legislature of this State, and a declaration of a belief in the Christian religion." Article 36: "That the manner of administering an oath to any person, ought to be such, as those of the religious persuasion, profession, or denomination, of which such person is one, generally esteem the most effectual confirmation, by the attestation of the Divine Being." Maryland Constitution, per se, Article 55: "That every person, appointed to any office of profit or trust, shall, before he enters on the execution thereof, take the following oath; to wit :-" I, A. B., do swear, that I do not hold myself bound in allegiance to the King of Great Britain, and that I will be faithful, and bear true allegiance to the State of Maryland; " and shall also subscribe a declaration of his belief in the Christian religion."); Massachusetts Constitution of 1780 (Declaration of Rights, Article 2: "It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great creator and preserver of the universe." Chapter 6, Article 1: "I, A.B., do declare that I believe the Christian religion, and have a firm persuasion of its truth; and that I am seized and possessed, in my own right, of the property required by the constitution, as one qualification for the office or place to which I am elected."); North Carolina Constitution of 1776 (Article 32: "[N]o person, who shall deny the being of God . . . shall be capable of holding any office or place of trust or profit in the civil department within this State."); Pennsylvania Constitution of 1776 (Article 2: "Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen." Plan or Frame of Government, Section 10: And each member, before he takes his seat, shall make and subscribe the following declaration, viz: "I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. (Cont'd)

language as totally prohibitory as that in the Establishment Clause: "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[10]

"The Ninth Circuit's ruling in this case produced an immediate national firestorm." Brief of Amicus Bipartisan Legal Advisory Group of the United States House of Representatives, at 7. Knowing that an admission of the true reason for this reaction – i.e., that the majority simply wants their government to incorporate their preferred religious icon in its midst – would not be accepted, the defendants and others have attempted to justify the Act of 1954 by allusions to history. However, as the preceding paragraph makes clear – and as the First Amendment's text, itself, confirms – such a revisionist view of unequivocal principle is an insult to the work of the framers. As Justice Black noted, the Establishment Clause was instituted because the given religious persuasion of the various colonies "depend[ed] largely upon what group happened to be politically strong enough to legislate in favor of its own beliefs." *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). As this case reveals all too well, the Clause is still needed for this exact same reason. This Court's acceptance of the case for review can make that fact clear, and resolve the "disarray" and incoherence.

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(Cont'd)

And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration."); South Carolina Constitution of 1778 (Article 17: "The qualification of electors shall be that every free white man, and no other person, who acknowledges the being of a God").

10. Regarding Article VI, Clause 3, Joseph Story wrote:

> This clause is not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test, or affirmation. It had a higher object; to cut off for ever every pretence of any alliance between church and state in the national government.

3 Joseph Story, *Commentaries on the Constitution* § 1841 (Boston, 1833).

**(a) Conflict among the Courts of Appeal**

The Ninth Circuit's decision in the instant case is in direct conflict with the Seventh Circuit's opinion in *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993). Thus, as suggested by Supreme Court Rule 10(a), a grant of certiorari would be appropriate in this case.

In fact, a review of *Sherman* could have been justified in its own right for its rather strange analysis. For instance, even though *Sherman* was decided a mere five months after Justice Blackmun wrote:

> Since 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision of *Marsh v. Chambers*, 463 U.S. 783, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983), has the Court not rested its decision on the basic principles described in Lemon.

*Lee v. Weisman*, 505 U.S. 577, 603 n. 4 (1992) (Blackmun, J., concurring), the Seventh Circuit's panel claimed that *Lemon* "as a general-purpose tool for administering the establishment clause is in doubt," 980 F.2d at 445. Thus, the *Sherman* court did not examine the purpose or the effects of the insertion of the words "under God," and focused instead on the question of "coercion."

With no need to find coercion in order to have an Establishment Clause violation,[11] the *Sherman* court was obligated to determine if there were other constitutional infirmities when it decided that coercion was absent. More to the point, however, is the extraordinary nature of that decision

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11. "[T]his Court has never relied on coercion alone as the touchstone of Establishment Clause analysis." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring).

in the first place, especially in view of the fact that this Court had found coercion to be present just five months earlier in *Lee*. There, the affected students were high school seniors at a one-time event who simply observed a non-governmental invited guest imparting religious dogma. In *Sherman* – as in the case at bar – the students were of a much more "impressionable" age, the challenged activity occurred nearly two thousand times for each student, the students actively participated in the espousal of the dogma, and they were led by their state-employed teachers. In fact, the *Sherman* panel even enunciated the rule:

> If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words *is* coercion, the Pledge of Allegiance becomes unconstitutional under all circumstances.

980 F.2d, at 444. How that court then concluded that the public school-based Pledge recitation passes constitutional muster is cryptic at best.[12] This Court's clarification of this matter is necessary to prevent further confusion.

**(b) Important question of federal law**

Under Supreme Court Rule 10(c), it is appropriate for the Court to grant certiorari when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." The meaning and extent of the Establishment Clause's protections is certainly an "important question of federal law." This is especially so when the issue under consideration has caused as much divisiveness and rancor as has occurred in the case at bar.

Both the United States and the Elk Grove Unified School District have argued that it is untenable for the Nation to have an official Pledge that bears conflicting messages dependent

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12. The Ninth Circuit panel majority noted this as well: "We have some difficulty understanding this statement." App., at 17a.

upon venue. United States Petition for Certiorari, at 25; EGUSD Petition for Certiorari, at 16. With this Newdow agrees. Of interest is that even in presenting their arguments, the correctness of the Ninth Circuit's ruling – and the pervasiveness of the myopia that exists when religious matters are at hand – is demonstrated. The Elk Grove defendants wrote:

> Significantly, this decision will result in substantial disruption of the daily lives of the school children in the EGUSD, as well as those attending public schools within the jurisdiction of the Ninth Circuit. These school children will find it necessary to reconcile why they are prohibited from willingly reciting the Pledge as a daily patriotic exercise when the public school children in the rest of the country are permitted to say the Pledge.[13]

EGUSD Petition for Certiorari, at 16. What they fail to appreciate is that the argument, of course, works both ways, and one could at least as reasonably write:

> Significantly, this decision will result in substantial disruption of the daily lives of the school children **outside** the jurisdiction of the Ninth Circuit. These school children will find it necessary to reconcile why they are forced to endure religious dogma espoused by their public school teachers during a daily patriotic exercise when the public school children in the Ninth Circuit are provided with the protections guaranteed by the First Amendment.

Unfortunately, this failure to see both sides of a religious issue is not limited to the parties. For instance, despite the enormous public outcry engendered by the ruling in this case,

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13. Of course, this is a patently erroneous characterization of the Ninth Circuit's opinion. Individuals may say anything they desire. As the Establishment Clause provides, it is only the government that is forbidden from embracing particular religious dogma.

the chief argument of the panel dissent was that the effect of the intrusion of the religious words, "under God," in the Pledge upon atheists is "*de minimis*." Thus, we see again the foresight of the framers, who recognized that even federal judges could be oblivious to their religious biases. Removal of the two religious words from the Pledge certainly raises no constitutional issue; yet there was a virtually unprecedented response when the Ninth Circuit stated that needed to be done. That Judge Fernandez could observe that response and then persist in contending that the insertion of those words – which no one can deny at least raises a First Amendment concern – is *de minimis* seems extraordinary.

Moreover, although the defendants have based their arguments on the effects of the Pledge on school children, the importance of the matter to atheistic adults cannot be overemphasized. To be sure, "[t]his Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs." *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring). However, "impressionability" is not the only parameter of concern. The aggravation, disgust and outrage of being turned into "political outsiders" and second-class citizens – generally unrecognized by children – is extensive to the disenfranchised adult citizens who find themselves despised and ridiculed due solely to their religious beliefs. Government, of course, has no duty to overcome private biases. But it may no more strengthen, encourage or even condone antipathy based on matters of conscience than it may do these things based on matters of race. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Only forty-nine percent of Americans would vote for an atheistic candidate. Appellant's Opening Brief, at 4 (n. 7). In the constitutions of at least eight states, there still exist

provisions that deny atheists the right to hold public office and/or testify in a court of law.[14] Although politicians are subject to ruin for even tangentially discriminatory references regarding gender, majority religion or race,[15] blatant offenses against atheists are not even acknowledged.[16]

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14. Arkansas State Constitution: Article 19, Section 1 ("No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any court."); Maryland State Constitution: Article 37 ("That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God."); Mississippi State Constitution: Article 14, Section 265 ("No person who denies the existence of a Supreme Being shall hold any office in this state."); North Carolina State Constitution: Article 6, Section 8 ("The following persons shall be disqualified for office: First, any person who shall deny the being of Almighty God."); Pennsylvania State Constitution: Article 1, Section 4 ("No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth."); South Carolina State Constitution: Article 17, Section 4 ("No person who denies the existence of a Supreme Being shall hold any office under this Constitution."); Tennessee State Constitution: Article 9, Section 2 ("No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this state."); Texas State Constitution: Article 1, Section 4 ("No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.")

15. The recent events related to Trent Lott's resignation as Senate Majority leader is a case in point.

16. When, on April 22, 2000, Miami Mayor Joe Carollo responded to the Bureau of Immigration and Naturalization Service's raid to free Elian Gonzales by stating, "These are atheists. They don't believe in God," no media protest was heard. Appellant's Opening Brief, at 4. When Congressman John J. LaFalce of New York issued a press release

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The Pledge of Allegiance served its patriotic purposes perfectly well for sixty-two years prior to Congress's passage of the Act of 1954. Accordingly, with strict scrutiny required for intrusions of religious dogma into government,[17] a compelling interest was required before the words, "under God," could have been permissibly interlarded. That interest has yet to be enunciated.

The majority of American citizens may take great pleasure in having their religious beliefs reflected in their government. That, however, is precisely what the Establishment Clause exists to prevent, and Newdow respectfully requests that this Court take this case to reinforce that fact.

**(2) Sovereign and Speech or Debate Immunities**

The Ninth Circuit ruled that "in light of the Speech and Debate Clause of the Constitution, Art. I § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing the Congress to enact or amend legislation," App., at 5a. Similarly, the United States notes that, "No federal statute waives the sovereign immunity of the United States of America from a suit for

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(Cont'd)

a month later, equating "secular atheism" with "greed, abject poverty [and] selfishness," no call for censure was noted. *Ibid.* And, of course – without the slightest criticism – the chief sponsor of the Act of 1954 was able to garner support for his legislation by placing "An atheistic American . . . is a contradiction in terms" into the Congressional Record. 100 Cong. Rec. 2, 1700 (Feb. 12, 1954) (Statement of Rep. Louis C. Rabaut).

17. [W]e have expressly required "strict scrutiny" of practices suggesting "a denominational preference," in keeping with "'the unwavering vigilance that the Constitution requires'" against any violation of the Establishment Clause.

*County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 608-609 (1989) (citations omitted).

declaratory or injunctive relief under the First Amendment, and thus the jurisdictional basis for respondent Newdow's suit against the United States is unclear." United States' Petition for Certiorari, at 2.

This raises an issue of basic constitutional construction that the Court has never previously addressed: Due to its unique nature,[18] is a waiver of sovereign immunity and Speech or Debate immunity implicit in the Establishment Clause?

To highlight the question, suppose Congress were to enact the following:

> We hereby declare that Roman Catholicism is the official, established religion of the United States of America.

Clearly, that would be in violation of the Establishment Clause's mandate. Yet what would occur? How could such a violation be remedied? What check or balance exists to prevent that constitutional abuse?

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18. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.

*Engel v. Vitale*, 370 U.S. 421, 430 (1962);

> Most of the provisions of the Bill of Rights, even if they are not generally enforceable in the absence of state action, nevertheless arise out of moral intuitions applicable to individuals as well as governments. The Establishment Clause, however, is quite different. It is, to its core, nothing less and nothing more than a statement about the proper role of government in the society that we have shaped for ourselves in this land.

*Marsh v. Chambers*, 463 U.S. 783, 802 (1983) (Brennan, J., dissenting).

In fact, that is precisely what the instant case is about. When Congress passed its Act of 1954, it said, in essence:

> We hereby declare that theism is the official, established religion of the United States of America.

To be sure, "there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power." *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting). But when fundamental constitutional rights are trampled upon, the framers could not have intended to leave a disenfranchised political minority with no recourse. On the contrary, as was stated in the earliest part of our history:

> This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

*Marbury v. Madison*, 5 U.S. 137, 178 (1803). As Chief Justice Marshall concluded, "[A] law repugnant to the constitution is void." *Id.*, at 180.

Chief Justice Rehnquist has noted:

> [W]hen the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan — the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter

> and to give each provision within that document the full effect intended by the Framers.

*Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, C.J., dissenting). Obviously, turning the Establishment Clause into a nullity does not give that provision "the full effect intended by the Framers."

> The judgment in [*Marbury v. Madison*] is one of the great landmarks in the history of the construction of the Constitution of the United States, and is of supreme authority . . . in respect of the power and duty of the Supreme Court and other courts to consider and pass upon the validity of acts of Congress enacted in violation of the limitations of the Constitution.

*Myers v. United States*, 272 U.S. 52, 139 (1926). Immunities designed to ensure that our liberties remain protected cannot be turned into shields that allow those very liberties to be attacked by those entrusted with providing the protection.

**(3) Article III Standing**

Although standing in Establishment Clause challenges should be easily determinable according to the parameters previously set forth in *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982), difficulties still arise. The need for further clarification in this arena also supports granting this Petition.

The Court of Appeals found that Newdow has standing as a parent, and therefore limited its standing analysis to that one realm. Newdow, however, has always believed that he primarily has standing in his own right. In fact – without minimizing the personal harm that occurs when one's child is inculcated with religious dogma while attending the public schools – the harm to an adult who is turned into "second-class" status on the basis of his religious persuasion is at least as severe.

**(a) Outsider status**

The Court has repeatedly stated that no American citizen should be turned into a "political outsider" due to his or her religious beliefs. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (O'Connor, J., concurring); *Lee v. Weisman*, 505 U.S. 577 (1992) (Blackmun, J., concurring); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668 (1984). That is, in fact, the "individualized harm" necessary to meet the "injury-in-fact" component of the current standing doctrine. To be sure, simply being offended by a governmental action is insufficient to show a "personalized injury." But being offended because the government has infringed upon one's societal status on the basis of his or her particular religious belief system is precisely the sort of personal injury that standing doctrine envisions.[19]

Since the inception of this case, Newdow has argued that he, himself, has been turned into an "political outsider" by the intrusion of the religious words, "under God," into the Pledge. Furthermore, like millions of his religious brethren, Newdow is forced to confront offensive religious dogma any time he

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19. [I]f the evil prevented by the establishment clause is the sending of messages which make citizens feel like "outsiders," as [Justice] O'Connor contends, an establishment clause plaintiff logically should not be required to allege a "substantial" or "severe" burden on *the exercise* of his religion. It should be sufficient, rather, to assert that he feels like an "outsider" because of some governmental message touching upon religion.

S.D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 268, 300 (1987).

wishes to join his fellow citizens in pledging his allegiance to the flag. This is an outlandish offense that needs to be examined under a strict scrutiny analysis. With both the District Court and the Defendants having accepted Plaintiff's claim that he has been made to feel like an "outsider" due to the governmental acts challenged in this case, R., at 187-188 (Tr. 51:16 – 52:4), the burden of proof has shifted to the government. Unless it can be shown that there is a compelling interest in "giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter),"[20] the Court should take this opportunity to announce once and for all that, in this country, every religious view will be protected by "the most demanding test known to constitutional law."[21]

**(b) Equal Protection**

This is an equal protection case where atheists such as Newdow – unlike those of the majority theistic religious persuasion – are unable to join their fellow citizens in pledging allegiance to the Nation's flag without being confronted with offensive religious dogma. As this Court has just made clear, "'[t]he "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.'" *Gratz v. Bollinger*, __ U.S. __ (June 23, 2003) (citing

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20. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995). The issue of sectarianism – and the confusion caused by the misapplication of that concept – is another aspect of the Establishment Clause that further warrants a grant of certiorari. Newdow has provided evidence of the varying and arbitrary manner in which that word has been used. *See* Complaint ¶¶ 42-48; Record Excerpts, at 131-135. Constitutionally, any religious dogma that excludes any American citizen on the basis of his or her religious beliefs is sectarian.

21. "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

*Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993)). In fact, both the imposition of the barrier and the inability to obtain the benefit exist in the instant action.

**(c) Taxpayer standing**

This Court's clear statement that "federal taxpayers have standing to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Article I, § 8, of the Constitution" *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988), should suffice to make it clear that Newdow has taxpayer standing in this case. His demonstration that federal (and state and local) tax dollars are used to promote the now-religious Pledge[22] has never been properly addressed.

**(d) Newdow's Parenthood**

Newdow is a devoted parent who shares joint physical custody of his daughter. Although he has been deprived of the legal custody of his child,[23] his interests and rights in directing her education have not been abrogated to anywhere near a degree sufficient to deprive him of standing as a parent in this case. This unanimous finding of the Ninth Circuit panel does not require review.

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22. *See* Original Complaint, ¶¶ 109-117; Plaintiff's April 26, 2000 Opposing Memorandum of Law, at 13-14.

23. It is not within the province of this Petition to detail the circumstances that led to this loss of legal custody. Suffice it to say that Newdow – an incredibly outstanding parent – was accused of "child neglect" for letting his daughter (while he dutifully stood by at the entrance) use an airport women's room. It was his challenge to the "expert psychologist" who made this ludicrous and irresponsible claim that resulted in this restriction of his fundamental constitutional right of parenthood. The matter is currently before the California Court of Appeal for the Third District (consolidated case Nos. C040840, C042384).

## CONCLUSION

The petition for a writ of certiorari should be granted. Americans of every religious persuasion should be accorded equal respect, and the uniqueness of the Establishment Clause - and its relevance with respect to governmental immunity – should be addressed. Finally, the Court should detail the requirements for standing, which have caused tremendous confusion in the lower courts.

Respectfully submitted,

MICHAEL NEWDOW, *Pro Se*
Post Office Box 233345
Sacramento, CA 95823
(916) 392-7382